IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT BENCH JAIPUR

O R D E R

Er. Sangeet Kumar & Others Vs. The State of Rajasthan & Others.

(SB Civil Writ Petition No. 2479/2000)

Date of Order : 13th December, 2006.

**Hon'ble Mr. Justice KS Rathore**

Mr. Bajrang Lal Sharma, Sr. Advocate with
Mr. CS Sharma, for the petitioners.
Mr. BS Chhaba, Additional Govt. Advocate.

By way of this writ petition the petitioners seek to challenge the seniority list dated 5.2.98 issued by the respondents wherein the petitioner who are direct recruits for the vacancies upto the year 1996-97 are shown at serial no. 731 and 824, whereas; the persons from serial no. 425 to 730 who were given one time promotion and promoted on the post of Assistant Engineer much after the petitioners have been ranked senior to the petitioners in

the said seniority list against which representations were given but no action has been taken till today by the department. Therefore this seniority list has been challenged on the ground that on the date of determination of the vacancies as per rule 9 of Rajasthan Service of Engineers (Building & Roads Branch) Rules, 1954 (for short, the Rules of 1954), there were no vacancies as on 1.4.96 against which the persons from serial no. 425 to 730 have been promoted and allotted the year 1996-97 as vacancies were created by upgradation on 9.12.96 and the same can only be filled against the year 97-98, therefore, assigning of seniority of the said persons above the petitioners is highly arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

It is also contended that otherwise also, as per the Departmental Promotion Committee Rules, vacancies can only be determined once in a year and vacancies occurring after the departmental

promotion committee meeting shall be treated as the vacancies of the next year and in the instant case vacancies were determined on 1.4.96 and on the basis of the same the departmental promotion committee was held on 28.6.96 and in compliance of the same, vacancies of the year 1996-97 were filled in vide order dated 19.7.96, but subsequently vide order dated 9.12.96, 300 posts of Junior Engineer were upgraded and were ordered to be filled in by one time promotion by inserting rule 7AA, therefore also, the petitioners are entitled to be ranked senior to the persons from serial no. 425 to 730 while determining the seniority.

Even otherwise, the review Departmental Promotion Committee is bound to take into consideration the record of the candidates and the number of vacancies as existed on 1.4.96 and in the instant case on 1.4.96 the said 300 vacancies were not in existence, therefore, there was no question of holding of the review

Departmental Promotion Committee and the said vacancies could have only be filled in by holding a fresh Departmental Promotion Committee for the year 1997-98 as per rule 9 read with rule 23(1) and rule 24A(2) of the Rules of 1954. The persons from serial no. 425 to 730 have wrongly been promoted by holding the review DPC which was held on 10.1.97 but as per Rule 11B the said review DPC does not fulfill the conditions enumerated in the said rule, as the said rules provide that the review of the proceedings of the DPC can be ordered on account of some mistake or error apparent on the face of the record or on account of the factual error substantially affecting the decision of the DPC or for any sufficient reasons for example change in seniority, wrong determination of vacancies, judgment/direction of any court or tribunal or where adverse entries in the confidential reports of an individual are expunged or toned down or a punishment inflicted on him is set aside or

reduced but none of the above conditions were fulfilled while holding the said review DPC, therefore, the recommendations of the review DPC are liable to be quashed and set aside by this Court.

Further, the case of the petitioners is that the respondents while drawing the seniority list dated 5.2.98 have not adhered to the quota of 50% by promotion and 50% by direct recruitment as provided in Schedule 1 to the Rules of 1954. The petitioners were recruited against the vacancies occurring from 1992-93 to 1996-97 and the quota to be filled by promotion have already been filled in by the respondents before the petitioners joined in 1996, therefore also the respondents cannot assign the seniority above the petitioners of the persons given one time promotion in the year 1997, therefore also, the said seniority deserved to be declared illegal, unreasonable, arbitrary and discriminatory and is liable to be quashed and set aside.

Besides that, the seniority list dated 5.2.98 has been drawn by the respondents in compliance of the judgment dated 16.4.91 passed in the case of G.N. Goyal Vs. State of Rajasthan & Ors. but the said judgment has been followed by the respondents only upto the vacancies of the year 1994-95 but for the vacancies arising thereafter the promotees have been given preference over the direct recruits which is also against the word and spirit of the said judgment passed by this Court in the aforesaid case wherein the Court had taken a serious note of the illegality perpetually being committed by the respondents in exceeding the quota of promotion and held that such illegality should be set right and the direct recruits must be given position to which they are entitled as per rules 9(1)(c) of the Rules of 1054, therefore also, the said seniority list deserves to be quashed and set aside and requires to be redrawn from the year 1995-96 onwards as per the judgment passed by this

Court in the case of GN Goyal.

Besides that, the persons promoted from serial no. 425 to 730 have been given one time promotion in view of the amendment made by the respondents in the Rules of 1954 by inserting rule 7AA wherein it has been provided that the posts of Junior Engineer can be upgraded to the post of Assistant Engineer and the said upgraded posts shall be filled in 100% by promotion in accordance with the procedure and quota laid down in the rules but no amendment was made in the Rule 28 of the Rules of 1954 which provide for seniority, therefore also, the said persons can not be ranked higher to the petitioners in the impugned seniority list dated 5.2.98 and thus the same deserves to be quashed and set aside.

The petitioners referred Rule 7AA of the Rules of 1954. In Rule 7A, Rule 7AA has been incorporated vide notification dated 9.12.96. Rule 7AA reads as under:-

> “One time promotion to the upgraded post of Assistant Engineer (Civil/Mechanical/ Electrical).
>
> Notwithstanding anything to the contrary contained in these rules or the schedule, upon the upgradation of the existing posts of Junior Engineer (Civil/Mech./Elect.) to the posts of Assistant Engineer (Civil/Mech./Elect.), the posts of Assistant Engineers so upgraded shall be filled 100% by promotion in accordance with the procedure and quota laid down in these rules.

And further referred Schedule I. As per Schedule-I for Assistant Engineer (Civil), the quota of recruitment was 50% by direct recruitment, 25% by promotion from the cadre of Sub Engineers and 25% by promotion from the cadre of Junior Engineers.

Learned counsel for the petitioners also referred Rule 9 of the Rules of 1954 which deals with the determination of vacancies. Rule 9(1)(a) provides that subject to the provisions of these rules, the Appointing

Authority shall determine on 1st April every year, the actual number of vacancies occurring during the financial year. And after referring rule 9 of the Rules of 1954, learned counsel for the petitioners referred rule 24 sub rule 11-B which is reproduced as under:-

> 11-B- The Government or the Appointing Authority may order for the review of the proceedings of the D.P.C. Held- earlier account of some mistake or error apparent on the face of record, or on account of a factual error substantially affecting the decision of the D.P.C. or for any other sufficient reasons e.g. change in seniority, wrong determination of vacancies, judgment/direction of any Court or Tribunal, or where adverse entries in the confidential reports of an individual are expunged or toned down or a punishment inflicted on him is set aside or reduced. The concurrence of the Department of Personnel and the Commission (where Commission is associated) shall always be obtained before holding the meeting of the review D.P.C.".

He also referred Clause (3) of Rule 1 of the

Rules & Instructions for Departmental Promotion Committee which provides-

> “Vacancies shall be determined only once a year. Vacancies occurring after the Departmental Promotion Committee meeting has been held shall be treated as the vacancies of the next year. Variation in the vacancies that may crop up between the date of requisitioning the Departmental Promotion Committee meeting and the date of Departmental Promotion Committee meeting held shall be taken into account at the Departmental Promotion Committee meeting. Clause (4) clarified that in view of the provisions of clause © of sub rule (1) of rule relating to determination of vacancies” incorporated in all the Service Rules, vide DOP Notification No. F.7 (2) DOP/A-II/81, date 21st December, 1981, for determining the vacancies of promotion quota shall be followed. This cycle order shall be continuous from year to year for determination of vacancies.
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> Clause 2- a question has arisen whether a vacancy caused by the retirement of a person on 31st March, i.e. on the last day of the year, will be treated as a vacancy of the year ending on 31st March

> or a vacancy in the subsequent year commencing from 1st of April. This question has been examined and it has been held that a person retiring on 31st of March holds the post till the afternoon of that day and the resultant vacancy will occur only the next day. It is, therefore, clarified for the information of all the Appointing Authorities that the vacancy caused by the retirement of a person on 31st March may be treated as a vacancy occurring on 1st April next and taken accordingly while determining the vacancies for the Departmental Promotion Committees.

In support of his submissions, learned counsel for the petitioner placed reliance on the judgment of Hon'ble the Supreme Court in the case of “Arvinder Singh Bains Vs. State of Punjab & Others” reported in (2006) 6 Supreme Court Cases 674. More particularly he referred paras 39 and 59.

Learned counsel for the petitioners placed an order dated 18.12.96 issued by the Government of Rajasthan, Public Works Department for perusal, whereby upgradation of

the posts of Junior Engineers to the posts of Assistant Engineers was made. As per this letter, 300 posts of Junior Engineer (Civil) were upgraded to the post of Assistant Engineer; 29 posts from Junior Engineer (Mech.) and 15 posts of Junior Engineer (Electrical) were upgraded to the post of Assistant Engineer.

Learned counsel for the petitioners further placed reliance on the judgment of Division Bench of this Court in the case of “Govind Narain Goyal Vs. The State of Rajasthan & Others” rendered in DB Civil Writ Petition No. 832/86 decided on April 16, 1991.

Per contra learned counsel appearing for the respondents has submitted that since the petitioners challenged the impugned seniority list dated 5th February, 1998 in the present writ petition and their dispute is within the definition of “Service Matter”, an alternative and efficacious remedy to file appeal before the Rajasthan Civil Services Appellate Tribunal is available to them and without availing

alternative efficacious remedy this writ petition is not maintainable.

The second objection which is raised on behalf of the respondents is that since the petitioners challenged the seniority list of Assistant Engineers dated 5.2.98 and they came with the plea that the persons shown in the said seniority list from serial number 425 to 730 are likely to be shown below to them, in these circumstances, it is apparent that all the persons shown in the seniority list from serial number 425 to 730 are the necessary party but the petitioners failed to implead them as party respondents and as such the writ petition deserves to be dismissed only on this count alone.

Further, on the merit, learned counsel for the respondents submitted that 300 posts of Junior Engineer (Civil) were upgraded to the post of Assistant Engineer with an intention to provide more opportunity of promotion to the Junior Engineers posted in the Department and

were not getting promotions even after completion of thirty years of their services as Junior Engineer (Diploma Holder) and after completion of sixteen years of service as Junior Engineer (Degree Holder). As per notification dated 9th December, 1996 and in view of the amended rule 7-AA, the posts of Assistant Engineer so upgraded, were to be filled in 100 per cent by promotion in accordance with the procedure and quota laid down in the rules and as mentioned above, since 300 more posts were available with the department by virtue of upgradation and these posts were made available for the year 1996, these upgraded posts were treated as the vacancies for the year 1996-97. The review Departmental Promotion Committee held earlier on 28th June, 1996 for 32 vacancies. Again, the Review D.P.C. was held on 10th January, 1997 to consider the case for selection to the post of Assistant Engineer for the year 1996-97 and promotions were made to the post of Assistant

Engineer vide order dated 22nd May, 1997 and it is pertinent to note that the Junior Engineers shown in the seniority list from serial number 425 to 730 were selected for the year 1996-97 under the promotion quota and since the petitioners were selected under direct recruitment quota for the year 1996-97, they were rightly shown in the seniority list dated 5th February, 1998 as per the provisions contained in Rule-28 of the Rules of 1954.

As per the provisions contained in Rule 28 of the Rules of 1954, the person appointed by way of promotion is likely to be considered as senior to a person appointed by direct recruitment during the same year. The petitioners those who are directly recruited were rightly shown in the seniority list dated 5.2.1998, as such no case whatsoever is made out in favour of the petitioners and the writ petition deserves to be dismissed".

Learned counsel for the respondents has referred rule 7-AA wherein by way of amendment

in rule 7A, it was made clear that the post of Assistant Engineer so upgraded shall be filled in 100% by promotion in accordance with procedure and quota laid down in these rules. As per the provisions of Rule 7-AA, the post of Junior Engineer and Sub Engineer has been abolished and upgraded to the post of Assistant Engineer therefore, these posts are only to be filled in 100% by promotion.

The respondent also referred rule 28. As per rule 28(1)-Seniority of persons appointed to the lowest post of the Service or lowest categories of posts in each of the Group/Section of the Service, as the case may be, shall be determined from the date of confirmation of such persons to the said post but in respect of persons appointed by promotion to other higher posts in the Service or other higher categories of posts in each of the Group/Section in the service, as the case may be, shall be determined from the date of their regular selection to such posts.

Sub clause (ii) of Clause 1 of Rule 28 provides that if two or more persons are appointed to the Service during the same year, a person appointed by promotion shall be senior to a person appointed by direct recruitment.

After referring the aforesaid provisions has submitted that as per rule 28 sub rule 2 in the rule itself it is categorically made clear that the person appointed by promotion shall be senior to a person appointed by direct recruitment. Thus, following the amended rule 7-AA as it is not disputed that the post of Junior Engineer and Sub Engineer has been abolished and upgraded and 300 posts of Junior Engineer/Sub Engineer have been upgraded and to consider the case on the upgraded post the amendment Section 7AA has been incorporated vide notification dated 9.12.86 and as per rule 7AA of rule 1954, the post of Assistant Engineer so upgraded shall be filled in 100% by promotion in accordance with the procedure and it is also not disputed that the petitioner

has not challenged the rule 7-AA and only challenged the impugned seniority list and since the petitioner has not challenged Rule 7AA, thus according to Rule 28 sub rule 2 admittedly the person appointed by promotion shall be senior to the person appointed by direct recruitment and as per rule 7-AA the upgraded post of Assistant Engineer can be filled 100% by promotion and following the rules, these posts are filled upto 100% by promotion and as per rule 28(2) they are ranked senior than in comparison to the petitioners who were appointed by direct recruitment.

The ratio decided in the judgment referred by the learned counsel for the petitioner of the Supreme Court and the Division Bench of this Court in the case of Govind Narain Goyal (supra) is not applicable to the facts and circumstances of the present case. As per Rule 28(2), the respondents are rightly shown senior than the petitioners, thus, the impugned seniority requires no interference by this

Court.

As per the discussions and observations made herein above, I find no force in the writ petition being devoid of merit and the same is hereby dismissed.

(KS RATHORE), J.